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Supreme Court of the United States.

No.

OCTOBER TERM 1970.

CHRISTOPHER C. MITCHELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on October 7, 1970, rehearing denied October 22, 1970.

1 (a). Reference to Official Report.

The opinion of the Court of Appeals for the First Circuit in this case is presently designated *United States* v. *Christopher C. Mitchell*, Docket Number 7614, 1st Circuit, October 7, 1970, and the text thereof is appended hereto.

1 (b). Statement of Ground for Jurisdiction.

The ground for jurisdiction in this Court is that a Court of Appeals has rendered a decision in conflict with the decision of the Court of Appeals in this case on the same matter, i.e., *United States* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969).

(i) Date of judgment—October 7, 1970; Date of entry—October 7, 1970.

(ii) Order denying rehearing, entered October 22, 1970.

(iii) Statutory provision conferring jurisdiction—28 U.S.C. § 1254 (1).

1 (c). Question Presented for Review.

The question presented is:

1. Did the failure of the Internal Revenue Service Special Agent to give your petitioner any warning of his fifth and sixth amendment rights, or even of the fact that he was being investigated for a criminal offense, so violate his constitutional rights that the admission of evidence obtained by reason of such violation was plain error which entitles him to a judgment of acquittal or a reversal?

1 (d). Constitutional Provisions and Statutes.

UNITED STATES CONSTITUTION, AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence.

26 U.S.C. § 7203. WILLFUL FAILURE TO FILE, RETURN, SUPPLY INFORMATION, OR PAY TAX (Vol. 6, 1964 Ed., p. 5764).

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.)

1 (e). Statement of the Case.

At all material times Mitchell was a funeral director doing business as the Tobin Funeral Service in Boston, Massachusetts. Tobin Funeral Service was incorporated in 1968, but, prior to incorporation, Mitchell operated it as sole proprietor (R. 9). He had a long history of alcoholism and emotional disturbance which required psychiatric treatment from time to time (R. 66-69, 96-99).

In October, 1966, Special Agent George T. Kelley of the IRS Intelligence Division was assigned to conduct a criminal investigation of Mitchell's tax returns as a result of a previous civil audit conducted by Revenue Agent Thomas McGagh (R. 5-6). IRS Intelligence Division Special Agents have as their principal duty the investigation of criminal violations of the Internal Revenue Code (R. 5) and in this respect do not differ from other federal law enforcement officers, such as FBI agents. On October 27, 1966, Agent Kelley, accompanied by McGagh, held his first two interviews with appellant Mitchell, one at Mitchell's place of business and one at an IRS conference room in Boston (R. 6, 8). During the first interview Agent Kelley repeatedly asked Mitchell whether he had filed returns, despite the fact that Mitchell manifested his unwillingness to answer any questions at that time and showed signs of considerable confusion as a result of this confrontation (R. 7, 25-30). At the second of these meetings Mitchell made self-incriminating statements which were introduced at trial as part of Agent Kelley's testimony (R. 8-11). Subsequent to the October 27th meetings, Agent Kelley met with Mitchell on two other occasions. On November 16, 1966, Mitchell came to the IRS offices in Boston to sign medical waivers at the request of Agent Kelley (R. 11). When Mitchell appeared at this meeting with a friend, Thomas H. Mulvey, he was under the influence of alcohol but Agent Kelley took his signature in spite of this fact (R. 39, 52-53, 62). On January 9,

1967, Agent Kelley again met with Mitchell at the IRS offices in Boston, at which time Mitchell turned over all his personal business records for the years 1960 through 1965 to Agent Kelley (R. 17-18). These records were also placed in evidence against Mitchell at trial. Mitchell produced these records in the belief that he was obligated to do so by law (Second Mitchell Affidavit, R. 99).

At no time during the above-named meeting did Special Agent Kelley advise Mitchell that he was under criminal investigation, nor did he warn him of his right to remain silent and to refuse to produce records, nor that he had a right to consult counsel before answering any questions or producing any records (R. 26, 30-31). This failure to warn was a violation of IRS policies, procedures and instructions existing at that time (Beli Affidavit, R. 100).

A major part of the evidence against Mitchell was obtained at these meetings including substantially all of the evidence on the essential element of willfulness.

The basis for federal jurisdiction in the Court of First Instance was 26 U.S.C. § 7203.

1 (h). Argument.

A Violation of Defendant's Rights under the Fifth and Sixth Amendments Entitled him to a Judgment of Acquittal or a New Trial.

The case of *United States* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), extends the doctrine of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to a situation where a taxpayer, not in physical custody, gives self-incriminating information to a special agent of the Internal Revenue Service without being warned of his constitutional rights. Accord, *United States* v. *Lackey*, 413 F. 2d 655 (7th Cir. 1969); *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); *Uni-*

ted States v. *Wainwright*, 284 F. Supp. 129 (D. Colo. 1968). Except for the petitioner's failure to raise the point in the trial court, the present case is squarely in point with *Dickerson* on its facts.

An impressive group of legal commentators support *Dickerson*. See Hewitt, The Constitutional Rights of the Taxpayer in a Fraud Investigation, 44 Taxes, 660 (1966); Duke, Prosecutions for Attempts to Evade Income Tax, 76 Yale L.J. 1, 31-76 (1966); Weiss, Special Agents need not advise a taxpayer of his constitutional rights, 26 J. of Taxation, 26 (1966); Lipton, Constitutional Rights in Criminal Tax Investigations, 53 ABAJ 517 (1967); Andrews, The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda, 53 Iowa L. Rev. 1074, 1111-1113 (1968); Comment, Constitutional Rights of the Taxpayer in a Tax Fraud Investigation, 42 Tul. L. Rev. 862 (1968).

In addition to the present case, there are numerous cases which refuse to extend *Miranda* to the factual situation presented here. *Cohen* v. *United States*, 405 F. 2d 34, 37 (8th Cir. 1969), and cases cited therein. Unlike *Dickerson* and the present case where the taxpayer received no warning whatsoever, in most of these cases, the taxpayer did receive some warning. There is, therefore, a clear conflict between circuits as a ground for granting this petition.

The language and reasoning of *Dickerson* cannot be improved upon in this brief. It is submitted that the psychological coercion of being questioned by government agents, enhanced in this case by the petitioner's history of alcoholism and emotional disturbance, constituted the equivalent of "custody" required by *Miranda*.

However, in the present case the Court is not required to go as far as *Dickerson*, *i.e.*, to require the full *Miranda* warning. Petitioner received no warning whatever, distinguishing this case from almost all the other cases on the subject.

It is submitted that the same result as in *Dickerson* should be reached by applying the reasoning of pre-Miranda decisions and the dissenting opinions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). "The test has been whether the totality of circumstances deprived the defendant of a 'free choice to admit, to deny, or to refuse to answer'." *Miranda* v. *Arizona*, *supra*, dissenting opinion, at 534. In the present case, it is not that petitioner was not free; it is that he was not given a choice. "The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. . . . I would continue to do so." *Escobedo* v. *Illinois*, *supra*, dissenting opinion, at 499; see 79 Harvard Law Review, 938, 974.

The factors constituting the "totality of circumstances" and favorable to petitioner are as follows:

1. No warning whatever.
2. Petitioner's emotional disturbance and alcoholism.
3. The failure of the special agent to follow IRS regulations, or at least customary procedure. See Bell affidavit, R. 100. *United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969).
4. The type of crime alleged, *i.e.*, white collar and nonviolent.
5. The manner in which the special agent surreptitiously inserted himself into what had started as a civil audit.

It is further submitted that the failure of prior counsel to raise the point in the trial court should not vitiate this

appeal. First, if petitioner's conviction was obtained by evidence largely procured by violation of his constitutional rights, this is the plainest kind of plain error. *Hensley* v. *United States*, 406 F. 2d 481, 484 (9th Cir. 1968); *Garay* v. *United States*, 399 F. 2d 696 (5th Cir. 1968); *United States* v. *Asendio*, 171 F. 2d 122 (3d Cir. 1948).

Second, prior counsel for petitioner did not know of the *Dickerson* case prior to or at trial. See Hurley affidavit. It was not called to his attention or to the attention of the Court by Government counsel. It was decided so recently (rehearing denied September 5, 1969, trial in this case January 20 to February 4, 1970) that in the exercise of reasonable diligence it would not have come to petitioner's counsel's attention prior to trial. (A decision does not appear in Shepard's until about six months or more after the decision is final.) Without the *Dickerson* decision to rely upon, it would have seemed futile to prior counsel to raise the point in view of the several contrary decisions of the First Circuit. See *Morgan* v. *United States*, 377 F. 2d 507 (1st Cir. 1967); *Schlinsky* v. *United States*, 379 F. 2d 735 (1st Cir. 1967); *Spinney* v. *United States*, 385 F. 2d 908 (1st Cir. 1967); *Taglianetti* v. *United States*, 398 F. 2d 558 (1st Cir. 1968).

Conclusion.

It is respectfully submitted that, for the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE R. FILLMAN,
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28 State Street,
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APPENDIX.

Opinion of the Court Below.

United States Court of Appeals for the First Circuit.

No. 7614.

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHRISTOPHER C. MITCHELL,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE *and* COFFIN, *Circuit Judges*.

Charles F. Choate, with whom *Mark A. Michelson*, *Randall T. Bell*, and *Choate, Hall & Stewart* were on brief, for appellant.

Carleton D. Powell, Attorney, Department of Justice, with whom *Herbert F. Travers, Jr.*, United States Attorney, *Johnnie M. Walters*, Assistant Attorney General, *Meyer Rothwacks*, and *Joseph M. Howard*, Attorneys, Department of Justice, were on brief, for appellee.

October 7, 1970.

COFFIN, *Circuit Judge*. Appellant was convicted of wilful failure to file income tax returns in violation of 26 U.S.C. § 7203. In the course of the investigation which resulted in prosecution, Special Agents of the Internal Revenue Service interrogated appellant on several occasions. On none of these occasions was he under arrest. The I.R.S. Agents gave Mitchell no warning of his fifth or sixth amendment rights or even of the fact that he was being investigated for a criminal offense. At these meetings appellant provided the Agents with incriminating evidence that was introduced against him without objection at trial.

Appellant now argues that this evidence was inadmissible under the Supreme Court's rulings in the cases of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and because the interrogations, in which the evidence was obtained, were in violation of I.R.S. procedures.

Appellant's trial counsel failed to object to the admission of this evidence despite the fact that the government's direct examination of the I.R.S. Agent brought out that Mitchell had not been given the warnings which it is now asserted on appeal were required by *Miranda* and I.R.S. procedures. Nor did he move to strike after his cross-examination in which he specifically asked the Agent what warnings had been given. Appellant, who is represented by different counsel on appeal, asserts that the admission of this evidence was plain error which this court may consider under Fed. R. Crim. P. 52(b). In *Dichner* v. *United States*, 348 F. 2d 167 (1st Cir. 1965), we indicated our reluctance to consider claims not raised below except in unusual circumstances. " 'Plain error' means precisely that, and 'exceptional circumstances' must in fact be exceptional." 348 F. 2d at 168.[1]

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[1] *See also Defino Martone* v. *United States*, 396 F.2d 229 (1st Cir. 1968); *Pugliano* v. *United States*, 348 F.2d 902 (1st Cir. 1965), *cert. denied*, 382 U.S. 939 (1965).

In urging us to invoke Rule 52(b) here, appellant relies on *Hensley* v. *United States*, 406 F. 2d 481 (10th Cir. 1968). *Hensley* also concerned an I.R.S. interrogation in which the *Miranda* warnings were not given. At trial the defendant failed to object to the admission of evidence obtained at this interrogation. Although noting that "even constitutional objections may be waived by a failure to raise them at the proper time", (406 F. 2d at 484, citing *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)), the Tenth Circuit agreed to consider the *Miranda* issue. At the time of trial, it was thought that *Miranda* did not apply to I.R.S. interrogations, but in the interim between trial and appeal, the Supreme Court announced its decision in *Mathis* v. *United States*, 391 U.S. 1 (1968), holding that under certain circumstances *Miranda* rights were available at I.R.S. interrogations. Because a defendant cannot waive, by failing to object, an unknown right, the court in *Hensley* considered the *Miranda* question for the first time on appeal.

The situation in this case is not the same as in *Hensley*. No controlling opinion has intervened to establish a right that had been thought not to exist at the time of trial. Appellant argues that although this court has ruled that *Miranda* does not apply to non-custodial interrogations conducted by the I.R.S.,[2] it has never ruled in a case such as that which faces us now, where the taxpayer has had no warning of any kind. Appellant points out that the Seventh Circuit has ruled on such a case, holding that warnings must be given. *United States* v. *Dickerson*, 413 F. 2d 1111 (1969). But the decision of another circuit is not control-

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[2] *Taglianetti* v. *United States*, 398 F.2d 558 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); *Spinney* v. *United States*, 385 F.2d 908 (1967), *cert. denied*, 390 U.S. 921 (1968); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir. 1967), *cert. denied*, 389 U.S. 920 (1967); *Morgan* v. *United States*, 377 F.2d 507 (1st Cir. 1967).

ling here.[3] Even though the facts of the other cases we have decided indicate that some warnings were given, the thrust of those cases is such that the district court can hardly be said to have committed plain error in admitting the evidence below.[4]

Appellant's attempt to raise this question for the first time on appeal serves only to reaffirm our belief in the wisdom of the rule which prevents litigants from raising new issues on appeal. We are left in the dark because the record is silent on several factual questions pertinent to a consideration of appellant's argument that some form of warning, if not the complete *Miranda* warning, is necessary. For example, at the second meeting with I.R.S. Agents when incriminating evidence was obtained from appellant and at subsequent meetings appellant was accompanied by other individuals. In *Miranda* and in *Mathis* the Court was primarily concerned with the coercion inherent in police interrogations. If we were to consider extending *Miranda* to interrogations such as the one in this case, we would also be interested in the degree of coercion involved in such interviews. On this question, the testimony of appellant's companions at the interview is clearly relevant, yet the failure to object below or to claim that the evidence was involuntarily given precluded such an inquiry.

Appellant's contention that these interrogations violated I.R.S. procedures serves as an even better example of the necessity of raising objections at trial. We rule today in the case of *United States* v. *Leahey* that I.R.S. Special Agents must follow their publicly announced procedures of giving warnings before interrogating taxpayers. Yet

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[3] *See Hadge* v. *Second Federal Savings and Loan Ass'n of Boston*, 409 F.2d 1254, 1254, 1256 n. 1 (1969).

[4] As the cases cited in *Cohen* v. *United States*, 405 F.2d 34, 37 n. 7 (8th Cir. 1969), indicate, the case relied on by appellant is probably inconsistent with the view of most circuits.

because this issue was not raised below in this case, we do not even know if the I.R.S. had a similar rule at the time appellant was interrogated. Appellant offers only an affidavit of one of appellant's counsel which contains the hearsay statement of a former I.R.S. employee that the I.R.S. did have such a rule at the time of appellant's interrogation. The government, on the other hand, asserts that this affidavit inaccurately characterises I.R.S. procedure. We cannot decide this kind of factual issue on appeal; if appellant wishes to raise it, he should have done so at trial when the Special Agent who conducted the interrogation should have been called to testify about I.R.S. procedures.

At this point in time, appellants cannot claim that the protections afforded them by the *Miranda* opinion are unknown to counsel. While it is true that the full ramifications of that case may not yet be decided, the issue of *Miranda's* applicability is often dependent on factual questions that cannot be dealt with for the first time on appeal. We do not hold that the court will never decide a *Miranda* question that is raised for the first time on appeal; it is enough to say that we shall exercise our discretion to permit those issues to be raised only in exceptional circumstances.

Appellant also contends that this court committed error when it refused to remand the record for further development. Appellant had filed in this court a motion to remand the record to the district court for a determination of the fairness of the trial. For the most part, this motion was based on the failure of appellant's trial counsel to call as a witness appellant's psychiatrist to testify as to appellant's state of mind at the time of the commission of the crime. This court denied the motion because of appellant's failure to move for a new trial below. We thought, and still think, that it would be improper for this court to

exercise its discretionary power granted by F.R.A.P. 47 to permit appellant to revive an issue which he waived by his failure to move below. A trial must terminate, and a judgment must at some point be considered final. *Mitchell* v. *United States*, 259 F. 2d 787 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850 (1958). No precedent exists for the procedure appellant seeks. In *Jackson* v. *United States*, 371 F. 2d 960 (D.C. Cir. 1966), on which appellant relies, there was a motion for a new trial. *United States* v. *Taglianetti*, 274 F. Supp. 220 (D. R.I. 1967), *aff'd*, 398 F. 2d 558 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969), concerned a wiretap upon a telephone which appellant had used on several occasions. The wiretap became known after the conviction, at the government's own admission. It having been impossible for the issue to be litigated at trial, the motion to remand, made by the government and unopposed by the defendant, was granted for the purpose of determining whether or not the illegal wiretap was a factor in the defendant's conviction.

If we have discretion to remand despite the unprecedented nature of appellant's request, we decline to do so. To overcome the burden imposed by such a novel and unprecedented motion, appellant must make a stronger showing than he has made here. Ample evidence was introduced at trial of the impairment of appellant's mental faculties as a result of alcoholism, including the testimony of another doctor who had treated appellant for this affliction. Furthermore, in light of a bench conference at which the court expressed reluctance to admit the psychiatrist's testimony, we cannot agree that trial counsel's decision not to call the witness prejudiced appellant's trial to the extent that has been suggested.

Affirmed.